85-1286

Supreme Court, U.S.
FILED
JAN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

ROBERT H. MESSING, PETITIONER
V.
ALFRED SIMON, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Counsel of Record
Peter M. O'Neill, Esq.
32 Nassau Street
Princeton, New Jersey 08542
(609) 924-0700

QUESTION PRESENTED

Whether the retroactive application of an attorney disciplinary rule to bar a libel suit, filed prior to the implementation of the said rule, by a grievant against a witness, for statements made by the witness to an investigating attorney during an attorney disciplinary investigation, constitutes denial of Due Process, where the grievant is left with no remedy under state law.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Reasons For Granting the Petition	12
Conclusion	18
Appendix A	1a
Appendix B	2a
Appendix C	9a
Appendix D	14a
Appendix E	21a
Appendix F	57a
Appendix G	58a
Appendix H	68a

TABLE OF AUTHORITIES

Cases:	Page
Chevron Oil Co. v. Huson 404 U.S. 97 (1971).....	16
Matter of Hearing on Immunity for Ethics Complainants, 96 N.J. 669.....	4
Ingraham v. Wright, 430 U.S. 651.....	16,17
Maressa v. New Jersey Monthly 89 N.J. 176.....	14
Paul v. Davis, 424 U.S. 639...	12,13,14
Rosenblatt v. Baer, 383 U.S. 75.....	15
Constitution Statutes, and Regulations	
United States Constitution Fourteenth Amendment.....	12,13,16,17
New Jersey Statutes Annotated, 2A:47A-1 (West, 1952).....	5

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NEW JERSEY SUPREME COURT

Counsel of Record
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Princeton New Jersey 08542
(609) 924-0700

OPINIONS BELOW

The Order of the New Jersey Supreme Court denying Petitioner leave to appeal is unreported. (App. A., infra, 1a.) No opinion was rendered by the New Jersey Supreme Court. The opinion of the New Jersey Appellate Division is not reported. (App. B, infra, 2a.)

JURISDICTION

The order of the New Jersey Supreme Court (App. infra, 1a.) denying Petitioner leave to appeal was entered on November 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Fourteen Amendment: The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law... .

STATEMENT

1. On January 31, 1984, the New Jersey Supreme Court adopted attorney disciplinary R. 1:20-11(b) (hereinafter "the Rule") which provided for absolute immunity from suit for grievants in ethics matters, clients in fee arbitration, and witnesses in both ethics and fee matters, for testimony or communications given in ethics or fee arbitration proceedings. The New Jersey Supreme Court, being "seriously divided on the wisdom of the Rule," issued a majority opinion and dissenting opinion, rather than an official Commentary on the Rule. Matter of Hearing on Immunity for Ethics Complainants, 96 N.J. 669; 671 (1984). The Rule is a bar to libel and slander suits as well as malicious prosecution suits. The Rule's text is as follows:

> (b) Immunity for Grievants, Clients and Witnesses Grievants in ethics matters, clients in fee arbitration cases and witnesses in both ethics and fee matters shall be absolutely immune from suit, whether legal or equitable in nature, for all communications to Committees, Fee Committees, the Director, the Board, or to appropriate staff and for testimony given in ethics or fee arbitration proceedings. This immunity shall not extent to any publication or distribution of information by a grievant, client or witness that violates R. 1:20-10.

The Rule, which became effective February 15, 1984, invalidated N.J. Stat. Ann. 2A:47A-1 (West 19 52), which statue expressly permitted an attorney to bring a malicious prosecution action against a complainant in connection with an ethics complaint. The previous New Jersey Court Rules did not address the question of immunity from suit for grievants or witnesses. In fact, the

certification of the Executive Counsel to the Disciplinary Review Board indicates that the adoption of this Rule was prompted by the filing of Petitioner's slander suit against the Respondent. (App. D, infra, pp. 19a).

2. This matter arises out of a malpractice suit filed on October 19 1982 by the Petitioner against the Respondent in connection with an accounting which Respondent prepared for Petitioner's matrimonial action. The Respondent was court-appointed to investigate and prepare an impartial evaluation of the income, expenses, liens, and holdings for each of the parties in the matrimonial action.

In or about August 1982, the Petitioner filed an ethics complaint against his ex-wife's attorney for alleged misconduct during the matrimonial

action. The complaint was investigated by the local Attorney Disciplinary Committee and the complaint was ultimately dismissed by the Committee.

In his report the Committee's investigating attorney referred to conversations he had during his investigation, including his conversations with Respondent. A copy of the investigation report was given to the Petitioner by the Committee .

On or about January 17 1984 Petitioner filed a complaint for slander against the Respondent for statements made by the Respondent during the disciplinary investigations.(App.C,infra).

On or about May 10, 1985, Petitioner caused a subpoena to be served on the investigating attorney to compel his testimony in the malpractice action. The purpose in soliciting this testimony was

to shed light on the Respondent's state of mind during the preparation of his accounting report.

Notice of Motion was filed by the Respondent on or about May 9, 1985, seeking to quash the subpoena served on the investigating attorney. An order was issued on June 5, 1985 by the Honorable James T. Murphy, Superior Court of New Jersey, quashing the subpoena. No formal opinion was issued by Judge Murphy. However, the transcript of his decision indicates his ruling that retroactive application of R. 1:20-11(b) was appropriate and that any conversations between Respondent and the investigating attorney were entitled to absolute immunity from suit. (App. E, infra).[1]

---

[1] The attorney who was the subject of the investigation subsequently consented to a release of the contents of the ethics file. Thus, the confidentiality of the proceedings is no longer in issue. (App. F, infra).

As noted in the transcript of Judge Murphy's decision, Petitioner argued, inter alia, that the Retroactive application of R. 1:20-11(b) would deter the Petitioner's vested right to protect his reputation. (App. E, infra).

A Notice for Leave to Appeal an Interlocutory Order was filed by the Petitioner with the Appellate Division on or about July 18, 1985. As was noted above, the Interlocutory Order Quashing the Subpoena, also worked to effectively ban the slander suit. Petitioner argued that the retroactive application of R. 1:20-11(b) would cause him to lose a vested right to proceed with a suit, which was already filed, (to protect his reputation), and be totally without remedy, in effect a denial of due process. Petitioner further argued that the

adoption of R. 1:20-11(b) did not constitute a recognition or continuance of common law doctrine.

Petitioner again raised the issue of loss of a substantive right to proceed with his slander suit in his appeal from Judge Murphy's Interlocutory Order Quashing the Subpoena (App. G, infra). and in his Petition for Certification to the New Jersey Supreme Court (App. H, infra).

The Appellate Division issued a final Order affirming the quashing of the subpoena. (App. B, infra). The Court did not issue or publish a formal opinion. However, in its supplemental statement on the Order, the Court stated that no cause of action could exist for statements made by the Respondent to the investigating attorney and that the retroactive

application of R. 1:20-11(b) was merely a recognition of common law. (App. B, infra).

Petitioner filed a Notice of Petition for Certification with the New Jersey Supreme Court on August 5, 1985 and a Petition for Certification on August 14, 1985, raising again the issue of the retroactive application of R. 1:20-11(b). On November 1, 1985, the New Jersey Supreme Court issued an Order denying Petitioner leave to appeal. This Order had the final effect of (1) affirming the Appellate Division opinion; (2) significantly diminishing Petitioner's ability to successfully prosecute the malpractice action; (3) working as law in the slander action; and (4) acting as a final judgment, in effect terminating Petitioner's slander action.

REASONS FOR GRANTING THE PETITION

This case presents a new and important question regarding the retroactive application, by a state supreme court, of a judicial decision which terminates a litigant's right to proceed with a slander suit, already filed, leaving him with no remedy under state law. The decision of the New Jersey Supreme Court effectively affirms the New Jersey Appellate Division's ruling on the retroactive application of R. 1:20-11(b) to bar petitioner's slander suit.

Petitioner submits that this decision presents an issue not reached by this Court in Paul v. Davis, 424 U.S. 693 (1976) regarding the protection which should arise under the Fourteenth Amendment for injury resulting from

defamation where the injured party is left with no remedy under state law. For this reason, review of the decision below is necessary.

In Paul v. Davis, supra, the Court noted that:

> "there exists a variety of interests which are difficult of definition but are nevertheless comprehended with the meaning of either 'liberty' or 'property' as meant in the due process clause. These interests attain this constitutional status by virtue of the fact that they have initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or significantly alter that protected status." 424 U.S. at 710-711.

In Paul v. Davis, supra, the Court held that injury to reputation alone was not sufficient to invoke the procedural protection of the Due Process clause.

However, the majority noted that the petitioner in Paul v. Davis, supra, was still left with the right to sue the state officials who libeled him in state court, under state tort law; therefore, he was not left without a remedy. In the case at bar, the petitioner, having filed and proceeded with the slander suit under then prevailing state law, is now left with no remedy whatsoever.

New Jersey, as have other common law jurisdictions, has recognized that defamation "embodies the important public policy that individuals and business entities should generally be free to enjoy their reputation unimpaired by false and defamatory attacks." Maressa v. New Jersey Monthly, 89 N.J. 176, 190 (1982). This recognition of an individual's interest in the protection of his good

name is in keeping with this Court's position, namely that,

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966). (Stewart, J., concurring.) (Emphasis added.)

Petitioner has challenged the constitutionality of the retroactive application of R. 1;20-11(b) as applied to his particular situation. It is not disputed that the adoption of the Rule was

in fact prompted by the filing of petitioner's slander suit. (App. D , infra, pp. 19a). This Court has recognized the inequities which may arise when retroactive application deprives an individual of any remedy on the basis of "superseding legal doctrine that was quite unforeseeable." Chevron Oil Co. v. Huson, 404 U.S. 97, 108 (1971).

The Court has not ruled on the precise issue presented in this case, namely whether the complete absence of any state-law remedy for defamation should give rise to Due Process protection. Petitioner submits that, as Justice Stevens has, in fact, suggested, it is the existence of an adequate state remedy for defamation which satisfies the Due Process requirement of the Fourteenth Amendment. See Ingraham v. Wright, 430

U.S. 651, 701 (1977) (Stevens, J., dissenting). Thus, the absence of an adequate state remedy should trigger protection under the Due Process clause of the Fourteenth Amendment.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Peter M. O'Neill
Counsel of Record

January 1986

SUPREME COURT OF NEW JERSEY
M-206 SEPTEMBER TERM 1985

24,449

ROBERT MESSING,

Plaintiff-Movant

v.

ALFRED SIMON,

Defendant-Respondent.

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 29th day of October, 1985.

CLERK OF THE SUPREME COURT
Original Signed by
Stephen Townsend

ORDER ON
MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-1162-84T5
MOTION NO. M-4423-84
BEFORE PART N

JUDGES: DREIER
DEIGHAN

ROBERT MESSING, :
:
VS. :
:
ALFRED SIMON. :

MOVING PAPERS FILED
June 20, 1985

DATE SUBMITTED TO COURT
July 15, 1985

DATE DECIDED
July 18, 1985

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR LEAVE TO APPEAL: GRANTED.

FOR THE COURT:

WILLIAM A. DREIER, P.J.A.D.
Original signed by
William A. Dreier

WITNESS, THE HONORABLE WILLIAM A. DREIER, PRESIDING JUDGE OF PART N, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 16th DAY OF JULY 1985.

CLERK OF THE APPELLATE DIVISION
Original signed by
Elizabeth McLaughlin

SUPPLEMENTAL:

The court has elected to consider the merits of the appeal simultaneously with the motion for leave to appeal on the motion papers alone pursuant to R. 2:11-2.

We note that although defendant has not presented a brief in opposition to

plaintiff's motion for leave to appeal, defendant's position has been presented to us by way of his brief included in plaintiff's appendix.

The report in which the allegedly defamatory statement by defendant was made to the investigating attorney for the Ethics Committee was forwarded to plaintiff, the complainant in the ethics matter, prior to the promulgation of R. 1:20-10(a) which mandates confidentiality. The statement made by the witness to the investigating officer was also part of the "proceedings" and thus likewise would have been confidential under the Rule. Statements made in the course of a judicial or quasi judicial proceeding are privileged and where imparted only as a subject of a confidential communication, such privilege is not lost. See cases

collected in Devlin v. Greiner, 147 N.J. Super. 446, 455-457 (Law Div. 1977). Since a "publication" of the defamatory statement is necessary in a libel or slander action, we must consider whether there has been the requisite "publication" if the allegedly offending statement was privileged under the law as it existed prior to the adoption of R. 1:20-10(a) and 1:20-11(b) and whether the confidentiality provisions of R. 1:20-10(a) and the immunity provision of R. 1:20-11(b) should be applied retroactively as declarative of the prior law.

The Supreme Court In the Matter of Hearing on Immunity for Ethics Complaints, 96 N.J. 669 (1984), indicated that by that decision it was establishing immunity standards for complainants against attorneys in ethics proceedings

different from, and more stringent than those in other professions and, in fact, overturned the Legislature's expression to the contrary in N.J.S.A. 2A:47A-1. This rule, however, was not new. See Toft v. Ketchum, 18 N.J. 280, cert. den. 350 U.S. 887, 76 S.Ct. 141, 100 L.Ed. 782 (1955); but see Friedland v. Podheretz, 174 N.J. Super. 73 (Law Div. 1980), determining the statute constitutional. Since the Toft rule, the amended Rules and the Supreme Court decision upholding them constituted a continuous recognition of the Supreme Court's power to declare the immunity of a complainant, the issue is whether the complainant's immunity would be carried over to that of the witness. This issue, prior to the specific amendment of R. 1:20-11(b) to cover witnesses, was treated by the Supreme court In the Matter of Hearing on Immunity for Ethics Complaints, 96 N.J. at 677,

footnote 8, citing English authority where "the leading . . . establishes the privilege as to defamation actions." Our court noted that "the policies outlined in support of that decision are much the same as those we rely on in endorsing R. 1:20-11(b) today." With such immunity so recognized by our Supreme Court under the common-law, we would be loath to determine other than retroactive application of R. 1:20-11(b) to protect defendant from liability for confidential statements made to the investigating attorney.

Since no cause of action can exist for these statements, we summarily affirm the order appealed from quashing the subpoena upon the Ethics Committee's investigating attorney.

We remand this matter to the Law Division for a determination as to whether any further cause of action exists in favor of plaintiff and against defendant for statements made other than in the conduct of the disciplinary proceedings. We do not retain jurisdiction.

Strauss, Wills, O'Neill & Voorhees
32 Nassau Street
Princeton, New Jersey 08542
(609) 924-0050
Attorney for Plaintiff

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY

ROBERT H. MESSING :

Plaintiff, :

v. :

ALFRED SIMON :

Defendant. :

Civil Action

COMPLAINT

Plaintiff Robert H. Messing, residing at 250 Bradley Place, Palm Beach, Florida by way of Complaint against defendant, Alfred Simon, says:

1. Defendant, Alfred Simon, is a certified public accountant.

2. On or about November 4, 1977 defendant was appointed by the Superior

Court of New Jersey, Chancery Division [sic] (Matrimonial), Bergen County as an accountant charged with the responsibility of evaluating marital assets in the case known as Messing v. Messing.

3. Plaintiff, Robert H. Messing, was the plaintiff in the matrimonial action recited in paragraph 2.

4. A final judgment of divorce in Messing v. Messing was ordered on April 13, 1981 thereby terminating and discharging defendant's appointment.

5. Thereafter, on or about February 24, 1983 defendant engaged in a conversation with Frank J. Cuccio, Esq.

6. During the conversation defendant made statements to Mr. Cuccio concerning defendant's relationship with plaintiff during the period of time

defendant acted as a court appointed accountant.

7. During the conversation defendant made oral statements to Mr. Cuccio that plaintiff "lied and lied and lied all the time".

8. Defendant also made oral statements to Mr. Cuccio that during the course of defendant's investigation as court appointed accountant plaintiff gave defendant an outdated lease in an attempt to understate the true value of a building located in Nutley, New Jersey.

9. Defendant also made oral statements to Mr. Cuccio that plaintiff "lied about and understated his assets and could never get a straight answer from him" with respect to defendant's investigation as court appointed accountant.

10. Defendant also made oral statements to Mr. Cuccio that plaintiff threatened to report defendant to the ethics committee of the accounting profession if defendant did not [sic] testify favorably at the court proceeding.

11. The statements made by defendant to Mr. Cuccio were defamatory, untrue, made with malice and designed to create adverse, derogatory and unpleasant feelings or opinions against plaintiff.

12. The statements made by defendant to Mr. Cuccio constitute slander per se.

13. By reason of defendant's statements plaintiff has suffered damages, diminished esteem, humiliation, loss of respect and loss of goodwill.

WHEREFORE plaintiff, Robert H.

Messing, seeks judgment against defendant, Alfred Simon for damages, pecuniary damages [sic], damages to reputation, damages for humiliation, damages for loss of esteem, punitive damages, costs of suit and attorneys fees.

STRUASS, WILLS, O'NEILL & VOORHEES

Original Signed by Robert E. Levy
Dated: January 17, 1984

Colette A. Coolbaugh, Executive Council
Disciplinary Review Board of the
Supreme Court of New Jersey
Richard J. Hughes Justice Complex
25 West Market Street, CN 037
Trenton, NJ 08625

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, BERGEN COUNTY
DOCKET NO. L-11808-82

Plaintiff,

ROBERT MESSING,

vs.

Defendant,

ALFRED SIMON.

Civil Action

CERTIFICATION

COLLETTE A. COOLBAUGH, certifies that:

1. I am an attorney-at-law of the State of New Jersey and serve as Executive Counsel to the Disciplinary Review Board.

2. The Disciplinary Review Board is an arm of the Supreme Court of New Jersey in an attorney disciplinary matters. Among its functions is the de novo review of all appeals from dismissals of ethics complaints by the District Ethics Committees. The Board also proposes rules or comments upon proposed rules, relating to the implementation of standards of conduct governing members of the Bar.

3. I am generally familiar with the above litigation and also with the case of Messing v. Simon filed on January 19, 1984 in the Bergen County Superior Court, Docket No. L-3202-84.

4. Since the latter case, Docket No. L-3202-84, is based upon a confidential investigative report which was appealed to the Board, I am filing this certification to help clarify for the

Court the procedural steps and actions taken in or resulting from the underlying ethics proceedings. Prior to preparing this certification I obtained from the attorney-respondent her consent to the release of the ethics file, R. 1:20-10(a)(2), a copy of said consent will be forwarded to the Court under separate cover.

5. The Disciplinary Review Board assumed jurisdiction of the complaint Robert Messing v. Susan I. Littman, DRB 83-145; District II-82-69E, when the grievant, Mr. Messing filed an appeal from the dismissal of his complaint. A copy of the investigative report dismissing the complaint is attached as Exhibit A.

6. While the appeal was pending before the Board, counsel for Mr. Messing sent a letter to me inquiring about the

procedures for deposing Mr. Cuccio concerning his interview with Alfred Simon. A copy of Robert Levy's letter of July 29, 1983 is attached as Exhibit B.

7. The appeal was considered by the Board at its meeting of August 17, 1983, at which time the board affirmed the dismissal. The Board did not address the question raised in Mr. Levy's July 29 letter. A standard dismissal letter was sent to Mr. Messing which advised him, inter alia, that pursuant to former Rule 1:20-5(d), "all proceedings involving this case must remain confidential and should not be disclosed." A copy of the Board's letter is attached as Exhibit C.

8. On September 13, 1983 my office received a copy of a Notice of Petition for Review of the Decision of the Disciplinary Review Board of the Supreme Court of New Jersey filed with the Supreme

Court by Robert Levy, counsel for Mr. Messing. In his supporting brief (p. 5) and in his Affidavit in Support of Petition for Review (paragraph 14-c) the petitioner requested the opportunity to depose District II Ethics Committee member Frank Cuccio concerning his interview with Alfred Simon. A copy of the Petition and supporting papers is attached as Exhibit D.

9. On November 1, 1983, the Supreme Court entered an Order denying the motion for leave to appeal. A copy of the order is attached as Exhibit E.

10. On January 31, 1984 I received a letter from Alfred Simon enclosing a copy of the complaint and summons filed in Messing v. Simon, Docket #L-3202-84. This complaint which alleged slander per se by Mr. Simon quoted directly from the confidential ethics

investigative report filed in Messing v. Littman (Exhibit A).

11. As a result of the slander suit filed by Mr. Messing against the ethics witness, Alfred Simon, I suggested to the Supreme Court that it further amend the recently adopted grievant and client immunity rule, R. 1:20-11(b), to include protection for witnesses. After due deliberation, the Supreme Court ordered that R. 1:20-11(b) be amended to provide witnesses with absolute immunity from suit for all communications within the context of ethics proceedings.

12. I was recently made aware of the fact that Frank Cuccio, Esq., has been supoenaed as a fact witness presumably to testify as to conversation he had with Alfred Simon during the course of his investigation of Messing v. Littman.

Mr. Cuccio's participation in any civil litigation arising out of an ethics proceeding is circumscribed by R. 1:20-10(a) which governs confidentiality in ethics matters. Under these circumstances when Mr. Cuccio was served with a subpoena and advised this office, I contacted the office of DeGonge, Garrity & Fitzpatric, specifically Patrick F. X. Fitzpatric, and requested that he move to quash the subpoena.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

COLETTE A. COOLBAUGH
Original signed by
Colette A. Coolbaugh

Dated: 6/4/85

DEGONGE, GARRITY & FITZPATRICK
A Professional Corporation
430 Broad Street
P.O. Box 1560
Bloomfield, New Jersey 07003
(201) 748-7400
Attorneys for Defendant

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO. L-11808-82

Plaintiff,

:

ROBERT MESSING,

:

vs.

:

Defendant,

:

ALFRED SIMON.

:

Civil Action

ORDER

This matter having been opened to the Court on Motion on Short Notice by DeGonge, Garrity & Fitzpatrick, P.A., attorneys for defendant, for an Order quashing a certain subpoena served on Frank J. Cuccio, Esq. and for a further Order impounding the file of the District

Ethics Committee for Bergen County in the matter of Robert H. Messing v. Susan I. Littman, Esq., and the Court having considered said matters;

It is on this 5th day of June, 1985,

ORDERED that the subpoena served upon Frank J. Cuccio, Esq. to compel his testimony in the matter of Messing v. Simon, Docket No. L-11808-82, be and is hereby quashed.

JAMES T. MURPHY, J.S.C.
Original signed by
James T. Murphy, J.S.C.

PAPERS CONSIDERED:

Notice of Motion
Movant's Certification/Affidavit
Movant's Brief
Answering Brief
Other: Attachment

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO. L-11808-82
CALENDAR NO. 32-7359

- - - - - - - - - - - - - -
ROBERT MESSING, :

Plaintiff, :

v. :

ALFRED SIMON, :

Defendant. :
- - - - - - - - - - - - - -

TRANSCRIPT
OF
DECISION

Date: June 5, 1985
Place: Bergen County Courthouse
Hackensack, New Jersey

B E F O R E :

THE HONORABLE JAMES T. MURPHY, J.S.C.

A P P E A R A N C E S :

PETER M. O'NEILL, ESQ.,
(Wills & O'Neill, Esqs.)
Attorneys for Plaintiff

PATRICK F. X. FITZPATRICK, ESQ.
Attorney for Defendant.

REPORTED BY:
JANET A. SANDGRAN, C.S.R.
Official Court Reporter

THE COURT: This motion is made in connection with the matter of Robert Messing v. Alfred Simon, Docket Number L-11808-82 Calendar Number 82-7359.

The defendant moves for an order quashing the subpoena ad testificondum served upon Frank J. Cuccio, Esq., to compel his testimony at the within action and further for an order impounding the file of the District Ethics Committee, Bergen County in the matter of Robert H. Messing v. Susan I. Littman, Esq. pursuant to Rule 1:38(d).

Based upon the certifications and documents submitted, I make the following findings:

One, in the certification of Frank J. Cuccio, he asserts that:

(A) He is an attorney at law of New Jersey and a member of the District Ethics committee for Bergen County. In

September, 1982 he was assigned to investigate a complaint made by Robert E. Messing against Susan Littman, Esq. who had previously represented Norma Messing in a dovorce proceeding in the Superior Court of Bergen County. Alfred Simon, a certified public accountant, had been appointed by a judge of the Superior Court in the divorce proceeding to evaluate the assets of Robert Messing and Norma Messing.

(B) Cuccio interviewed Alfred Simon in carrying out Cuccio's professional obligations as a member of the Committee and because Cuccio felt that Simon had certain knowledge of relevant facts that could assist him.

(C) Simon consented to the interview. Cuccio considered any information provided by Simon as confidential

(D) On or about March 11, 1983 Cuccio filed his report with the District Ethics Committee and recommended dismissal of the complaint against Littman. The complaint was dismissed and an appeal by Mr. Messing to the Disciplinary Review Board was also dismissed.

(E) "On or about September 12, 1981 I was served by the attorney for Mr. Messing with a notice of petition to the Supreme Court for review of the decision of the Disciplinary Review Board. Among the relief sought by Mr. Messing was the right to depose me with regard to the interview of Alfred Simon." The petition for review was denied.

(F) Cuccio has recently been served with a subpoena ad testificondum to testify in the matter of Messing v. Simon.

"From what I can gather, the plaintiff seeks testimony from me as to my conversations with Mr. Simon in the course of my investigation of the Littman complaint."

(G) "It was and is my understanding that the proceedings of the Ethics Committee" are confidential -- strike that.

(G) "It was and is my understanding that the proceedings of the Ethics Committee . . . are confidential unless the respondant consents or the Supreme Court directs otherwise."

(H) "To require me to testify . . . in a civil action regarding information obtained in the course of my duties would subject me to break the confidentiality" -- strike that. "Confidentiality . . ." it would also "frustrate the intent of the disciplinary procedure established by the Supreme Court."

(I) "If witnesses statements can be used in other legal proceedings unrelated to the Ethics Complaint, as an officer of the court, I would be obliged to advise them that whatever they said could possibly result in litigation being filed against them. With that knowledge, it would be a rare witness who would cooperate and provide the Committee with the information needed to perform its duties."

Two, in the brief filed in support of the motion it is asserted that:

(A) Some time prior to November of 1977 Robert Messing instituted a suit for divorce against his wife Norma Messing in the Superior Court of New Jersey, Bergen County, Docket Number M-11400-76. The issue of equitable distribution was hotly contested. On November 15, 1977 the

Honorable John J. Cariddi signed an order appointing Alfred Simon, CPA to investigate and render an impartial report on the assets of the litigants.

The matter was tried before the Honorable Conrad Krafte with Joel Albert representing Mr. Messing and Susan Littman, Esq., of Rikes, Danzig, Scherer & Debevoise representing Mrs. Messing. A written decision was handed down by Judge Krafte. It was appealed. The matter was settled pending appeal.

In addition to preparing his report, Simon testified for approximately days before Judge Krafte.

(B) In October, 1982 the plaintiff Robert Messing sued Simon charging him with acts of alleged malpractice and seeking both compensatory and punitive damages. (The instant action).

(C) About August, 1982 Robert Messing filed an Ethics Complaint against his former wife's attorney, Susan Littman, Esq. The complaint was assigned to Frank Cuccio, Esq., a member of the Ethics Committee for investigation. In the course of investigation, Cuccio inquired of Simon as to his knowledge of Mrs. Littman's professional conduct. On or about May 11, 1983 Cuccio submitted to the Committee his written report recommending dismissal of the complaint. In that report Cuccio paraphrased various conversations he had including persons he spoke to including his conversation with Simon. A copy of the written report was served on Mr. Messing as the complainant.

(D) In January of 1984 Mr. Messing filed another suit against Alfred Simon alleging that he was slandered by Simon and again sought

compensatory and punitive damages. This action is also pending in Bergen County under Docket Number L-3202-84.

(E) The dismissal of the Ethics Complaint against Littman was appealed by Messing and was affirmed. An appeal to the Supreme Court was denied. It has been "indicated that in a certification filed with the Supreme Court Mr. Messing sought, through counsel, the right to depose Frank Cuccio with regard to his communications with Mr. Simon. The right to depose a Committee member of the Ethics Committee was denied by the Court."

(F) Plaintiff now seeks to subpoena Mr. Cuccio as a witness in the alleged malpractice case against Simon. "It is presumed that the plaintiff seeks to elicit from Mr. Cuccio the substance of his conversations with Mr. Simon in the course of his duties as a member of the Ethics Committee."

(G) Rule 1:20-10 provides in part "All proceedings . . . pursuant to Rule 1:20 shall be confidential and shall not be disclosed . . . except as authorized by the Rules or as provided by the Supreme Court and as follows:

"( ) On the scheduling of the oral argument for final discipline by the Supreme court . . . or

"(2) At the request of or with the consent of the respondant . . . or

"(3) On the entry of final orders of the Supreme Court in respect of disciplinary proceedings; or

"(4) Upon the order of the Supreme Court."

Movant asserts that none of the above exceptions apply and in support thereof quotes Chief Justice Wilentz In The Matter of the Hearing on Immunity for Ethics Complaints, 96 N.J. 669 (1983) at

Page 674 "little damage in the form of blemished reputations would be suffered by attorneys. In the overwhelming proportion of cases, the fact of the complaint and its disposition will remain private (that being the Rule of our Court) when a complaint is dismissed at its inception as being totally frivilous."

(H) The records of the District Ethics Committee are confidential as per Rule 1:20-10(a). Disclosure would violate the privilege set forth in New Jersey Evidence Rule 34 N.J.S.A. 2A:4A-27 which provides ("No person shall disclose official information of this State or the United States (a) if disclosure is forbidden by or pursuant to any Act of Congress or of this State or (b) if the Judge finds that disclosure of information of the action will be harmful to the interest of the public."

(I) Rule 120-11(b) provides that witnesses in Ethics Matters "shall be absolutely immune from suit whether legal or equitable in nature for all communications to appropriate staff".

Communications between Simon and Cuccio during the preliminary investigation are protected by this Rule. "Surely, the Supreme Court enacted this Rule in an effort to assure that a free flow of accurate information with the attorney discipline process . . . . to permit the plaintiff's examination of Mr. Cuccio with respect to his conversations with the defendant during his investigation would nullify the protection afforded by the Rule."

Retroactive application is appropriate in order to properly effectuate the intent of the Rule. See Gibbons v. Gibbons, 86 N.J. 515 (1981); St. v. Gervasio, 94 N.J. 23 (1983).

Three, in the brief filed in opposition to the motion it is asserted that:

(A) A motion for leave to appeal dismissal of the Ethics Complaint against Ms. Littman was filed. In the certification in support of the motion for leave to appeal filed with the Supreme Court counsel sought the right to depose Mr. Cuccio regarding his interviewing the defendant. The order issued by the Supreme Court denying the motion for leave to appeal is a one sentence order which does not discuss the merits of the deposition request.

(B) "Contrary to the defendants' allegations in their brief plaintiff seeks to subpoena Mr. Cuccio as a witness to elicit testimony from Mr. Cuccio regarding Mr. Simon's state of mind which we believe would be relevant and admissible at the trial in this matter."

(C) Ms. Littman gave a statement to Messing's attorney concerning the substance of the conversations she had with Simon. Accordingly, she waived the right of confidentiality of the substance of the proceedings.

(D) "Furthermore, Rule 1:20-10 also provides that the record of proceedings conducted in a disciplinary investigation may with the consent of the respondent and upon the ultimate determination of the proceedings may be disclosed."

Messing further contends that the defendant must agree that the proceedings against Littman have long been concluded and that "This fact in conjunction with Littman's sworn statements regarding the underlying factors of the proceedings constitute an exception to this confidentiality requirement."

(E) Messing was supplied by the Committee with a copy of the investigative report prepared by Cuccio as well as a copy of his findings with no investigations of -- strike that -- with no instructions of confidentiality and is therefore the Committee has waived any right to now claim confidentiality as to the contents of the investigation report.

(F) Rule 1:20-11(b) provides immunity to witnesses. Mr. Cuccio is not a party to this action -- strike that -- to this suit. Thus, his immunity from suit is not an issue in this matter. "There is no discussion in Rule 1:20-11(b) regarding confidentiality of communication and the Rule is simply inapplicable in this situation."

Furthermore, Rule 1:20-11(b) was adopted January 3 , 984 and became effective February 5, 984. Plaintiff's

malpractice suit against the defendant was filed October 26, 1982. The opinion in Hearing on the Matter of Immunity for Ethics Complaints makes no provision for retroactive application of this Rule. 96 N.J. 669 (1984).

The adoption of Rule 1:20-11(b) represents a very clear break from the preexisting situation and is directly contrary to N.J.S.A. 2A:47A-1 (citing State -v- Gervasio, Supra for the principle where there is a "clear break with preexisting State Constitutional adjudication" it should not be given retroactive effect and Gibbons -v- Gibbons, Supra for the principle that "the general Rule of Statutory construction favors prospective applicaiton of the statute" and "the final determining factor will be whether the retroactive application of this statute results in a

manifest injustice to the party adversely affected by the application of the statute."

Four, In reply movant asserts

(A) There is nothing in Rule 1:20-10 which supports the proposition that confidentiality is lost when an attorney testifies when an Ethics Complaint is filed against her.

(B) There is no authority to support the proposition that by supplying a complainant with a copy of the investigative report the Ethics Committee waives confidentiality. Rule 1:20-3(f) requires the Committee to furnish complainant with a copy. Providing grievant with a copy of a report is designed to permit him to exercise his right to appeal.

(C) To permit Cuccio to testify would nullify the immunity protection

afforded witnesses by Rule 1:20-11(b). Witnesses questioned during the course of an investigation are "absolutely" protected from suit.

(D) Procedural statutes and rules of court are generally applied retroactively. Feutchbaun -v- Constantini 59 N.J. 167, 172 (1971). Rule 1:20-11 is a procedural rule governing the attorney discipline process. The reason for a presumption against retroactive application is that people rely upon existing law and have well settled expectations which are disturbed by retroactive application of new laws. Daughters of Miriem Center for the Aged -v- Matthews 590 F. 2d 1250 (3rd Cir.1978). Such an expectation on the part of plaintiff herein cannot be established. He could not have relied upon the absence of immunity of witnesses as the

information he seeks was confidential. Defendant had a reasonable expectation that his statements would not be used. Rule 1:20-11(b) simply assured that the expectation will not be violated.

Five, the essential facts are not disputed. they are:

(A) Prior to November, 1977 Robert Messing sued his wife Norma for divorce in Bergen County under Docket No. M-11 400-76. Susan Littman, Esq. represented Mrs. Messing. Judge Cariddi appointed Alfred Simon CPA to investigate and render an impartial report of the assets of the litigants. In addition to preparing his report, Simon testified for approximately 12 days before Judge Krafte. Judge Krafte rendered written decision which was appealed. The matter was settled pending appeal.

(B) In October, 1982 Plaintiff Robert Messing sued Simon charging him with acts of alleged malpractice and seeking both compensatory and punitive damages. (The instant action Docket No. L-11808-82).

(C) About August, 1982 Robert Messing filed an Ethics Complaint against Littman. The complaint was assigned to Frank Cuccio, Esq., a member of the Ethics Committee for investigation. In the course of his investigation Cuccio interviewed Simon as to his knowledge of Ms. Littman's professional conduct. Simon consented to that interview. Cuccio considered any information provided by Simon as confidential. On or about May 11, 1983 Cuccio submitted to the Committee his written report recommending dismissal of the complaint. In that report Cuccio paraphrased the various

conversations he had with persons he spoke with, including his conversation with Simon. A copy of the written report as well as a copy of the Committee's findings was served on Mr. Messing as the complainant with no instructions of confidentiality. The ethics complaint against Littman was dismissed, which was appealed by Mr. Messing and the dismissal was affirmed. In a motion for leave to appeal filed in the Supreme Court counsel sought the right to depose Cuccio regarding his interview with the defendant. The order issued by the Supreme Court denying the motion for leave to appeal was a one sentence order. Ms. Littman gave a statement to Messing's attorney concerning the substance of the conversations she had with Simon.

(D) In January, 1984 Mr. Messing filed another suit against Simon alleging that he was slandered by Simon and again sought compensatory and punitive damages. This action was also pending in Bergen County under Docket No. L-3202-84.

(E) Cuccio has recently been served with a subpoena ad testificondum to testify in this malpractice action of Messing v. Simon Docket No. L-11808-82. Cuccio believes that the plaintiff "seeks testimony from me as to my conversation with Mr. Simon in the course of my investigation of the Littman complaint." Plaintiff's counsel asserts that he "seeks to subpoena Mr. Cuccio as a witness to elicit testimony from Mr. Cuccio regarding Mr. Simon's state of mind which we believe would be relevant and admissible at trial in this matter."

Six, Cuccio's conversations with Simon in the course of Cuccio's performing his duties as a member of the District Ethics Committee investigating the Ethics Complaints against Susan Littman, Esq. are entitled to confidentiality under the provision of Rule 1:20-10 which provides in part "all proceedings. . . and records . . . pursuant to Rule 1:20 shall be confidential and shall not be disclosed . . . except as authorized by the Rules or as provided by the Supreme Court and as follows:

"(1) On the scheduling of oral argument for final discipline by the Supreme Court . . or (2) at the request or with the consent of the respondent . . . or

"(3) On the entry of final orders of the Supreme Court in respect of disciplinary proceedings or

"(4) Upon the order of the Supreme Court."

The language that "all proceedings . . . and records . . . shall be confidential and shall not be disclosed" is mandatory and compels confidentiality and non-disclosure.

The enumerated exceptions do not contain words that compel disclosure. If any of the exceptions are met, disclosure at best -- strike that -- at best if any of the exceptions are met, permissive disclosure may be allowed. In the instant case the Supreme Court has not ordered disclosure and the respondent has not consented. The issuance of the order denying the motion for leave to appeal cannot be construed as compelling disclosure under exception number three If such were the case, all the complainant would have to do to nullify and frustrate

the mandated confidentiality is file a motion for leave to appeal and then claim that the denial of such motion would compel disclosure. This Court does not choose to so interpret exception number three.

Even the plaintiff does not contend that exception number three compels disclosure. He asserts "furthermore, Rule 1:20-10 provides that the record of proceedings conducted in disciplinary investigation made with the consent of the respondent and upon the ultimate determination of the proceedings may be disclosed."

The plaintiff has failed to submit any compelling reasons why the mandated confidentiality of the conversations should be pierced. Plaintiff seems to distinguish between conversations and state of mind. It is difficult to perceive how Cuccio could give any

testimony as to Simon's "state of mind" without testifying as to the substance of the conversations.

The rule of our court is for confidentiality concerning Ethics Committee proceedings and records. See Matter of Hearing on Immunity for Ethics Complaint 96 N.J. 669 (1984) at Page 674 where the Court stated:

"At the same time it is likely, in fact, that little damage in the form of blemished reputations will be suffered by attorneys. In the overwhelming proportion of cases, the fact of the complaint and its disposition will remain private (That being the Rule of our court when a complaint is dismissed practically at its inception as being totally frivilous.) The only real damage will be the anxiety and insult experienced by the lawyer."

To hold that these conversations were not entitled to confidentiality would totally frustrate the language of the rule. This Court is completely satisfied that in the totality of the circumstances present in this case - strike that. This Court is completely satisfied and finds that in the totality of the circumstances present in this case the substance of the conversations between Simon and Cuccio in the course of Cucccio's performing his duties as a member of the District Ethics Committee investigating the Ethics Complaint filed by Messing against Littman are entitled to full confidentiality and non-disclosure.

Seven, Cuccio's conversations with Simon in the course of Cuccio performing his duties as a member of the District Ethics Committee Investigating Ethics Complaints against Susan Littman, Esq.

are entitled to immunity under the provisions of Rule 1:20-11(b).

Rule 1:20-11(b) which became effective February 15, 1984, provides in part ". . . witnesses in . . . Ethics . . . matters shall be absolutely immune from suit whether legal or equitable in nature, for all communications to committees. . . or to appropriate staff and for testimony given in Ethics proceedings."

The conversations between Simon and Cuccio were communications made to a member of the Committee and appropriate staff in Ethics proceedings and are entitled to absolute immunity from suit -- strike that.

I find that the conversations between Simon and Cuccio were communications made to a member of the Committee and appropriate staff in Ethics proceedings and are entitled to absolute immunity from suit.

Plaintiff's argument that the rule should not receive retroactive application is not persuasive. He asserts that Rule 1:20-11(b) represents a very clear break from the pre-existing situation and is directly contrary to N.J.S.A. 2A:47A-1 citing State -v- Gervasio 94 N.J. 23, (1983) and Gibbons -v- Gibbons 86 N.J. 515 (1981).

However, the immunity rule does not represent a very clear break from the pre-existing position of the Supreme Court enunciated in Toft -v- Ketchum 18 N.J. 280 (1955) where the Court stated at Page 287 "We therefore find that the filing of a complaint with an Ethics and Grievance Committee is privileged and that an attorney cannot predicate a malicious prosecution action or similar suit upon it."

Accordingly, this Court finds that Rule 1: -- strike that Rule 1:20-11(b) should receive retroactive application.

In Matter of Hearing on Immunity for Ethics Complaints, Supra, at Page 671 the Court set forth that ". . . the strong public policy in favor of maintaining strict adherence to the rules of discipline required the removal of any impediment to the effective functioning of the disciplinary system" and at Page 672 "the public policy considerations making unacceptable any such chilly effect were deemed important enough to overcome the well founded arguments against such immunity . . ."

"Within a year, obviously in response to Toft the legislature passed N.J.S.A. 2A:47-1." Id. Page 672.

Apparently, the above mentioned public policy was deemed to be so strong as to extend the immunity to witnesses.

The purpose is to encourage the people to come forth. That purpose should not be undercut and discouraged or frustrated.

For immunity to have any meaning the individual must be free to make disclosures, give statements and supply information without fear of those disclosures being used against him. To permit any conversation with Cuccio to be used against Simon in the present civil action would have a devastatingly chilly effect on the stated purpose of the rule and would violate the rule granting immunity to witnesses.

Eight, accordingly this Court finds that the conversations between Cuccio and Simon which are the subject matter of the subpoena served on Frank Cuccio are privileged, protected by the confidentiality provisions of Rule]:20-

10 and protected by the immunity provisions of Rule 1:20-11(b).

It is therefore ordered that the subpoena ad testificondum served upon Frank J. Cuccio, Esq. to compel his testimony in the matter of Messing -v- Simon, Docket No. L-11808-82 is hereby quashed.

It is not necessary for this Court to enter any order impounding the District Ethics Committee File since Rule 1:20-10(a) provides in part "all proceedings . . . and records . . . pursuant to Rule 1:20 shall be confidential and shall not be disclosed . . . except as authorized by these rules or as provided by the Supreme Court . . . ."

I am returning a notice of motion that was received yesterday from Mr. Fitzpatrick to Mr. Fitzpatrick and what purported to be a response in

opposition to that notice of motion was returned to Mr. O'Neill and I advise him to file them in the normal course. They were both received in the mail yesterday for hearing on short notice and I told them that I could not do that.

(Whereupon the hearing adjourns.)

C E R T I F I C A T E

I, JANET A. SANDGRAN, C.S.R., an Official Court Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes in the above-entitled matter.

JANET A. SANDGRAN, C.S.R.
Official Court Reporter
Original Signed by
Janet A. Sandgran, C.S.R.
Lic. #639

ITT COMMUNICATIONS
SERVICES, INC.

100 Plaza Drive
Secaucus, N.J. 07096
Telephone (201) 330-5766

Susan I. Littman
Staff Counsel

June 3, 1985

Colette A. Coolbaugh, Esq.
Counsel, Supreme Court
Disciplinary Review Board
Richard J. Hughes Justice Complex
25 West Market Street CN - 037
Trenton, New Jersey 08625

Subject: Messing v. Simon
DRB 83-145
District II-82-69E

Dear Ms. Coolbaugh:

Pursuant to Rule 1:20-10(a)(2), I hereby authorize release of any relevant materials in the subject file to be used as may assist the Court in related civil litigation.

Please feel free to call upon me if any further assistance is required.

Very truly yours,

Susan I. Littman
Original signed by
Susan I. Littman

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Legal Argument IV from
Brief and Appendix for
Plaintiff-Appellant Messing

Filed June 20, 1985

POINT IV

RETROACTIVE APPLICATION OF R. 1:20-11(b) IS INAPPROPRIATE AND SHOULD NOT BE PERMITTED IN THIS CASE.

The purpose of R. 1:20-11(b) is to provide immunity from suit to, among others, grievants and witnesses in ethics matters for communications made to the committee or for testimony given at ethics proceedings. Thus, there is an important distinction between confidentiality and immunity. Mr. Cuccio is not a party to this suit; thus, his immunity from suit is not an issue in this matter. There is no discussion in R. 1:20-11(b) regarding

confidentiality of communication and the rule is simply inapplicable in this situation. Furthermore, it is important to note that R. 1:20-11(b) was adopted January 31, 1984 and became effective February 15, 1984. Plaintiff's malpractice suit against the defendant was filed on October 26, 1982.

The initial point in determining the appropriateness of the retroactivity of R. 1:20-11(b) is the recent New Jersey Supreme Court opinion of In the Matter of Hearing [sic] on Immunity for Ethics Complaints in which the Court provided a lengthy discussion of the proposed immunity rule. 96 N.J. 669 (1984). The Court, which itself was divided 4 to 3 in approving the rule change, traced the history of the proposed immunity rule noting that the court-appointed

disciplinary committee was divided also on the issue of implementing this immunity rule. The Court provided an extensive discussion of the status of immunity rules in other jurisdictions as well as providing a detailed discussion as to their reasons for adopting this rule. Specifically, the Court noted that the rule was being adopted "not as a matter of practical expediency, but as a matter of principal." 96 N.J. at 678. More importantly, for the purposes of this discussion, the Court focused the justification for this rule upon the right of citizens to bring complaints against lawyers without the fear of threat of suit against them in retaliation and the goal of enhancing public trust. In this regard the Court noted, "why jeopardize that trust in the very least by allowing even

one citizen to be sued on account of a complaint made against a lawyer, by allowing even one citizen to be threatened with such suit or by publicly asserting, through a statute, that such a threat can be made good." 96 N.J. at 679. The statute to which the Court referred was N.J.S.A. 2A:47A-1 which expressly allowed a malicious prosecution to be brought by [sic] the complainant against [sic] an attorney who was the subject of an ethics complaint. It is clear from this discussion that the purpose of this rule was to protect ethic complainants, not to allow witnesses to maliciously malign the grievant in the action, as plaintiff submits was the situation in this matter.

At the lower level, defendant cited several cases in support of his argument for the retroactivity of R. 1:20-11(b)

none of which were supportive of his position. The defendant cited the case of Feuchtbaum v. Constantini 59 N.J. 167 (1971) for the proposition that procedural statutes and court rules are generally given retrospect to the application. The issue of Feuchtbaum was whether substituted service, pursuant to R. 4:4-4(i), could be made on an insured motorist at his last known address in the State of New Jersey. The court allowed this retrospective application, noting that there was "no vested right to escape service of process. 59 N.J. at 172. The case at bar involves the retrospective application of a rule which clearly affects vested rights. The implementation of R. 1:20-11(b) was in direct conflict with N.J.S.A. 2A:47A-1 which again clearly governs the vested

right of protection of one's name and reputation from slander. The case of In the Tenure Hearing of Grossman 127 N.J.Super 13 (1974) cited by the defendant is similarly inapposite. In [sic] Grossman the issue was the dismissal of a male teacher who had undergone sex reassignment surgery on the grounds that retention would result in emotional harm to the student body. The ancillary issue in that case was whether the suspended teacher was entitled to back pay. Pursuant to a subsequent amendment to New Jersey statutes, the Court noted that "generally, statutes relating to substantive rights are construed to operate prospectively, in the absence of a clear expression of opposite intent, where statutes relating to procedure and remedy are applicable to pending

proceedings where vested rights will not be disturbed or obligations of contract." 127 N.J. at 35. The Court found that an amendment regarding the period during which a teacher could be suspended without pay was procedural and not substantive. Again, this case is not applicable to the case at bar because R. 1:20-11(b) clearly alters substantive rights. Lastly, defendant cited Daughters of Miriam Center for the Aged v. Matthews, 590 F.2d. 1250 (Third Cir. 1978). This case has no relevance to the matter at bar because at issue in that case was the validity of an administrative rule which by its language expressly permitted retroactive recapture of certain Medicare payments. This is clearly not the situation in the case at bar where both the language of R. 1:20-11 as well as the New Jersey Supreme Court

opinion implementing that rule does not provide for retroactive application.

A recent New Jersey Appellate Division decision demonstrates the analysis applied by our Court in determining the retroactivity of a particular provision. In the State v. Hughes (N.J. App. Div. A4483-82-T4, decided March 1, 1985) the issue was the retroactivity of an amendment to N.J.S.A. 2A:70-4 which became effective July 3, 1980 requiring that the list of holders of driver's licenses be used in making jury lists. The Court found that the amendment could not be applied to a defendant because his trial commenced on September 9, 1980, noting that "it is perfectly clear that the Legislature, in providing an arbitrary effective date for the amendment, could not have intended to make

invalid the final product of processes that began legally under the former statute." Finding no language in the amendment directing retroactive application, the Court found that the Legislature understood and approved the fact that in some circumstances juries after July 3, 1980 from jury lists that had been compiled prior to July 3, 1980." Similarly, in the case at bar, it is reasonable to assume that the Supreme Court understood that the time of the implementation of R. 1:20-11(b) there were a number of ethics complaints and ancillary matters either pending or which had been completed to which the rule change would not be applied. Thus, plaintiff submits that it is clear that the New Jersey Supreme Court intended a prospective application of R. 1:20-11(b).

The Court had the opportunity of authorizing the implementation of R. 1:20-11(b) to note the retroactive application of the rule. It can be assumed that the Court did not do so because it felt such an application would be inappropriate.

CONCLUSION

For the reasons set forth above, it is respectfully requested that the INterlocutory Order be quashed.

Respectfully submitted,
WILLS & O'NEILL

Original Signed by
Karen L. Cayci
For the Firm

SUPREME COURT OF NEW JERSEY

Question Presented from
Petition for Certification
of Plaintiff Messing

Filed August 15, 1985

QUESTION PRESENTED

DID THE COURT BELOW ERR IN GRANTING RETROACTIVE APPLICATION OF R. 1:20-11(b)?

REASON WHY CERTIFICATION SHOULD BE GRANTED

THE SUPREME COURT HAS NOT DEFINITELY SPOKEN ON THE ISSUE OF RETROACTIVE APPLICATION OF R. 1:20-11(b) WHICH PRESENTS A SIGNIFICANT ISSUE FOR THE COURT AFFECTING THE SUBSTANTIVE RIGHTS OF PARTICIPANTS IN ETHICS PROCEEDINGS.

The Supreme Court opinion of In the Matter of Immunity for Ethics Complaints, 96 N.J. 699 (1984) represents the Court's most recent statement on the immunity standards for complainants in ethics proceedings. Rather than providing an

official commentary on R. 1:20-11(b) which was adopted by the Court on January 31, 1984, the Court, noting that it was "seriously divided on the wisdom of the rule," issued a majority opinion and a dissenting opinion. 96 N.J. at 671. The majority noted that under English common law a privilege from defamation actions did exist with regard to statements and testimony made in the course of judicial proceedings, citing English authority supportive of a witness's immunity from malicious prosecution as demonstrative of analgous policies to those relied upon by the Court in endorsing R. 1:20-11(b). 96 N.J. at 677, footnote 8. It must, however, be emphasized that within that same footnote the Court provided contra decisions indicating a rejection of those same policies by English authority.

Furthermore, as the Court noted, R. 1:20-11(b) as adopted, specifically allows a defamation suit based on a complainant's statement made in violation of the confidentiality requirement of the rule, indicating inroads to common law immunity. 96 N.J. 675. Therefore, it is respectfully submitted that it is not clear in the opinion whether the Court's reference to certain supporting English authority for the proposed rule represented the Court's intent to apply the rule retroactively.

It cannot be gainsaid that the Court was aware that at the time of the implementation of R. 1:20-11(b) there were a number of ethics complaints pending or which had been completed to which the rule change would not be applied. Furthermore, the Court recognized the

momentous impact that its decision could have, finding nevertheless that it was necessary to "adopt the rule we think is needed despite its conflict with existing legislation," namely N.J.S.A. 2A:41A-1. 96 N.J. at 678.

Thus, the Court has been presented with an opportunity, by this Petition for Certification, to clarify its intent in implementing R. 1:20-11(b), an action which the Court has recognized as invalidating a state statute and which has and will continue to have a very significant impact on the filing of ethics complaints and the vitality of ethics proceedings, generally. 96 N.J. at 677. As noted by the majority, while the number of attorneys has increased by 30 percent in the last five years, the number of fee arbitration and ethics complaints has

grown by 56 percent. 96 N.J. at 674, footnote 2. These facts indicate the growing public awareness of the ability to file an ethics complaint and, it is respectfully submitted, compel the Court to hear this petition and issue a conclusive ruling on this matter.

CONCLUSION AND CERTIFICATION OF COUNSEL

For the reason set forth above it is resepctfully requested that the Court hear this Petition for Certification and reverse the decision of the Court below.

I hereby certify that this Petition for Certification presents substantial questions and is filed in good faith and not for the purposes of delay. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Respectfully submitted,
WILLS & O'NEILL

Original Signed by
Karen L. Cayci
For the Firm

No. 85-1286 (2)

Supreme Court, U.S.
FILED
MAR 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

ROBERT H. MESSING,

Petitioner,

vs.

ALFRED SIMON,

Respondent.

On Petition for Certiorari to the New Jersey Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENT

PATRICK F.X. FITZPATRICK
Attorney for Respondent
430 Broad Street
Bloomfield, New Jersey 07003
(201) 748-7400

THOMAS D. FLINN
Of Counsel and
On the Brief

3658
Lutz Appellate Printers, Inc. • NJ (201) 257-6850 • NY (212) 840-9494 • PA (215) 563-5587
MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

16 pgs

QUESTIONS PRESENTED

1. Whether the retroactive application of an attorney disciplinary rule which effectively bars a libel suit by a grievant against a witness to attorney disciplinary proceedings is an appropriate issue for review by the United States Supreme Court on certiorari.

2. Whether retroactive application of an attorney disciplinary rule which effectively bars a libel suit by a grievant against a witness in attorney disciplinary proceedings constitutes denial of due process.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations ii

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 2

Statement 4

Reasons for Denying the Writ 6

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) 9, 10

Friedland v. Podhoretz, 174 N.J. Super. 73 (Law Div. 1980) 7

In the Matter of Hearing on Immunity for Ethics Complainants, 96 N.J. 669 (1984) 8

Contents

Page

Lands v. Basemen, 200 N.J. Super. 247 (App. Div. 1985) 10

Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982) 8

Paul v. Davis, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976) 7, 8, 9

Rodrigue v. Aetna Realty & Surety Company, 395 U.S. 352, 23 L. Ed. 2d 360, 89 S. Ct. 1835 9

Sperry v. Florida, 373 U.S. 379, 101 L. Ed. 2d 428, 83 S. Ct. 1322 (1963) 7

Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) 7

Statutes Cited:

28 U.S.C. § 1257(3) 2

42 U.S.C. § 1983 8

Rules Cited:

New Jersey Court Rules:

R. 1:20 3

R. 1:20-3(f) 5

Contents

Page

R. 1:20-5 3

R. 1:20-5(b)(c)(d) 2

R. 1:20-5(d) 7

R. 1:20-10 3

R. 1:20-11 5

R. 1:20-11(b) 7, 10

United States Constitution Cited:

Fourteenth Amendment 8

Other Authorities Cited:

Constitution of New Jersey, Art. 6, Sec. 2, Paragraph 3 3

Pressler, Rules Governing the Courts of the State of New Jersey, with Comments and Annotations, Gann Law Books, 1986 Edition 2, 3

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No. 85-1286

In The

Supreme Court of the United States

October Term, 1985

ROBERT H. MESSING,

Petitioner,

vs.

ALFRED SIMON,

Respondent.

On Petition for Writ of Certiorari to the New Jersey Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENT

OPINIONS BELOW

The order of the New Jersey Supreme Court denying petitioner leave to appeal is unreported. *See* Petitioner's App. A, p. 1a. No opinion was rendered by the New Jersey Supreme Court. The opinion of the New Jersey Appellate Division is not reported (Petitioner's App. B, p. 2a).

JURISDICTION

Petitioner alleges jurisdiction under 28 U.S.C.A. § 1257(3). The order of the New Jersey Supreme Court (Petitioner's App. A, p. 1a) denying petitioner's application for leave to appeal was entered on November 1, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rules Governing the Courts of the State of New Jersey

> R. 1:20-11 Miscellaneous procedures in connection with disciplinary matters.
>
> (B) Immunity for grievants, clients and witnesses. Grievants in ethics matters, clients in fee arbitration cases and witnesses in both ethics and fee matters shall be absolutely immune from suit, whether legal or equitable in nature, for all communications to committees, fee committees, the director, the board, or to appropriate staff and for testimony given in ethics or fee arbitration procedings. This immunity shall not extend to any publication or distribution of information by a grievant, client or witness that violates R.1:20-10.
>
> Note: Adopted January 31, 1984 to be effective February 15, 1984. Source—Paragraphs (c), (d) and (e) formerly R. 1:20-5(b), (c) and (f). Pressler, *Rules Governing the Courts of the State of New Jersey, With Comments and Annotations,* Gann Law Books, 1986 Edition.

R. 1:20-10 Confidentiality.

(A) All proceedings conducted and records made pursuant to R.1:20 (discipline of members of the bar) shall be confidential and shall not be disclosed to or attended by anyone except as authorized by these rules or as provided by the Supreme Court . . . .

(Adopted January 31, 1984 to be effective February 15, 1984.) Pressler, *Rules Governing the Courts of the State of New Jersey, With Comments and Annotations,* Gann Law Books, 1986 Edition.

R. 1:20-5 Resignation; miscellaneous proceedings in connection with disciplinary matters.

(d) Confidentiality. All proceeding (sic) conducted and records made pursuant to R. 1:20 shall be confidential and shall not be disclosed to or attended by anyone except as authorized by these rules . . . .

(Adopted February 23, 1978, to be effective April 1, 1978); (d) Amended February 28, 1979 to be effective immediately, Pressler, *Rules Governing the Courts of the State of New Jersey, With Comments and Annotations,* Gann Law Books, 1984 Edition.

Constitution of New Jersey 1947, Article 6, Section 2, Paragraph 3.

Supreme Court, Rules; Admission to practice of law; discipline of persons admitted.

> The Supreme Court shall make rules governing the admission of all Courts in the State and, subject to the law, the practice and procedure in all such Courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

STATEMENT

Sometime prior to November of 1977, Robert Messing instituted an action for divorce against his wife, Norma Messing in the Superior Court of New Jersey, Bergen County, Docket No. M-11400-76. During the course of that matrimonial litigation, the question of equitable distribution of property was hotly contested by both parties. In an attempt to resolve the issue and to give the court guidance, Honorable John J. Cariddi, J.S.C. signed an order on November 15, 1977 appointing Alfred Simon, C.P.A to investigate and render to the court a report of the assets of the litigants.

The issue of equitable distribution of property was tried before the Honorable Conrad Krafte, J.S.C., Joel Albert, Esq., representing Mr. Messing and Susan Littman, Esq., representing Mrs. Messing. In addition to preparing his report, Alfred Simon, C.P.A. testified for approximately 12 days before Judge Krafte.

A written decision was rendered by Judge Krafte following a lengthy trial. Although the court's ruling was appealed, the parties settled their differences prior to the matter being heard by the Appellate Division of the New Jersey Superior Court.

In October 1982, the petitioner, Robert Messing, instituted suit against the respondent, Alfred Simon, charging him with acts of alleged malpractice and seeking both compensatory and punitive damages. That action is pending in the Superior Court of New

Jersey, Law Division, Bergen County, Docket No. L-11808-82.

On or about August of 1982, Robert Messing filed an ethics complaint against his wife's attorney, Susan Littman, Esq. The complaint was assigned to Frank Cuccio, Esq., a member of the District Ethics Committee for Bergen County, for investigation. Mr. Cuccio undertook his investigation and in the course of doing so, made an inquiry of the respondent, Alfred Simon, as to his knowledge of Ms. Littman's professional conduct.

On or about May 11, 1983, Mr. Cuccio submitted to the secretary of the District Ethics Committee his written findings recommending a dismissal of the complaint against Ms. Littman. In his written report, Mr. Cuccio referred to and paraphrased the various conversations he had with persons he spoke with during the course of his investigation, including conversations he had with the respondent, Mr. Simon. A copy of the written report was served on Mr. Messing as a complainant, as is required by the New Jersey Court Rules. R. 1:20-3(f).

On January 17, 1984, petitioner filed a second suit against respondent Alfred Simon alleging that he was slandered by Mr. Simon and again sought compensatory and punitive damages.

On January 31, 1984, the New Jersey Supreme Court adopted R. 1:20-11, to be effective February 15, 1984, which provides that "witnesses in both ethics and fee matters shall be absolutely immune from suit, whether legal or equitable in nature, for all communications to committees, fee committees, the director, the board or to appropriate staff and for testimony in ethics or fee arbitration proceedings."

Petitioner sought to subpoena Frank Cuccio, Esq., as a witness in the trial of the professional malpractice action against respondent. It is presumed that the petitioner sought to elicit from

Mr. Cuccio the substance of his conversations with Mr. Simon in the course of his duties as a member of the District Ethics Committee.

By order dated June 5, 1985, Honorable James T. Murphy, J.S.C., granted respondent's motion to quash the subpoena served upon Mr. Cuccio (Petitioner's App. E, p. 21a).

Petitioner sought leave to file interlocutory appeal from the Appellate Division of the New Jersey Superior Court. The Appellate Division issued a final order affirming Judge Murphy's order quashing the subpoena (Petitioner's App. B, p. 2a).

Petitioner filed a petition for certification with the New Jersey Supreme Court, which denied petitioner's application for leave to appeal (Petitioner's App. A, p. 1a).

REASONS FOR DENYING THE WRIT

Petitioner correctly points out that the order of Judge Murphy quashing the subpoena of Mr. Cuccio, served in the course of the professional malpractice action, acts as a termination of the slander action. Petitioner cannot prove the alleged slander without the testimony of Mr. Cuccio.

Petitioner asserts that certiorari should be granted pursuant to Rule 17(c) of the Supreme Court Rules,

> When a State Court or Federal Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court, or has decided a Federal question in a way in conflict with applicable decisions of this Court.

It is respectfully submitted, however, that the within matter

presents no issue of federal law. Rather, this is a simple slander action, which is totally within the domain of the states. Even when the tort of slander is committed by an officer of the state, the offense does not rise to federal or constitutional levels. *Paul v. Davis*, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). Petitioner's argument that retroactive application of the rule of the New Jersey Supreme Court which denied him his cause of action for slander violates his due process rights, is not well taken.[1]

Further, this Court has steadfastly refused to become entangled in the regulation of attorneys admitted to any bar but its own. Petitioner, therefore, seeks review by this Court in another area of law traditionally reserved to the states besides tort law; *i.e.*, regulation and discipline of attorneys.

This Court has frequently held that the state has a legitimate and substantial interest in the regulation of the legal profession and the practice of law. *Sperry v. Florida*, 373 U.S. 379, 101 L. Ed. 2d 428, 83 S. Ct. 1322 (1963). A constitutional challenge of the disciplinary rules enacted by the New Jersey Supreme Court, this Court applied the *Younger* [*Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)] doctrine of abstention in the absence of a showing of bad faith, harassment, or that

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1. Respondent does not concede that R. 1:20-11(b) terminated petitioner's cause of action for slander. Rather, respondent has maintained consistently in the state courts that petitioner's cause of action never existed. Petitioner has argued that he had a perfectly viable cause of action for slander upon filing his complaint, but was denied his remedy when the New Jersey Supreme Court enacted R. 1:20-11(b). However, other New Jersey court rules, particularly, former R. 1:20-5(d) provided statements made by respondent to Frank Cuccio, Esq., were confidential in nature. Further, state common law provided that statements made during the course of an attorney disciplinary proceeding are absolutely privileged, and could not form the basis of a slander action. *Friedland v. Podhoretz*, 174 N.J. Super. 73 (Law Div. 1980).

the state rules were "flagrantly and patently" unconstitutional because of the importance of state interest inpending state disciplinary proceedings. *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 73 L. Ed. 2d 116, 102 S. Ct. 2515 (1982).

The New Jersey Supreme Court enacted Rule 1:20-11(b) in furtherance of its compelling interest and maintaining the integrity of the practicing bar, and its attorney disciplinary process. *In the Matter of the Hearing on Immunity for Ethics Complainants,* 96 N.J. 669, 679 (1984). These are matters historically, and most properly left to the judicial department of the states. *Sperry v. Florida, supra.*

Petitioner, however argues that retroactive application of the rule which acts to deny him his cause of action for the tort of slander, constitutes a denial of due process. This Court has addressed the issue of a federal claim for the tort of slander in the context of a § 1983 proceeding (42 U.S.C. § 1983). In the case of *Paul v. Davis*, 424 U.S. 693, *supra*, the Court held that where defendants, police officers, had allegedly committed a slander against the plaintiff in that action by publishing the plaintiff's photograph on a flyer entitled "City of Louisville, Jefferson County Police Department's Active Shoplifters," did not constitute an actionable violation of § 1983 or the Fourteenth Amendment. In order to recover, the plaintiffs in that case would have had to prove that defendants had deprived him of a right secured by the Constitution of the United States.

> While not uniform in their treatment of the subject, we think that the weight of our decisions establishes no constitutional doctrine converting every defamation by a public official into a deprivation of liberty within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.

Paul v. Davis, supra at 702. Further,

> Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, Petitioner's defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any "liberty" or "property" interests protected by the Due Process Clause.

Id. at 712.

It is clear, therefore, that the right to be free from defamatory or libelous statements, while an important one recognized under state law, is not a constitutional right. It follows, therefore, that a state law or rule restricting or eliminating the right to recover for slander in certain circumstances, cannot constitute a violation of federally guaranteed rights.

Finally, petitioner relies upon the case of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) for the proposition that that case protects him against retroactive application of the rule. The *Chevron Oil Company* case dealt with the question of whether or not the rule of the Supreme Court stated in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 23 L. Ed. 2d 360, 89 S. Ct. 1835 (1969) that the Louisiana one year statute of limitations for personal injury actions applied to actions under the Outer Continental Shelf Lands Act, rather than the Admiralty Doctrine of Laches, which had previously been applied in actions under the Lands Act. The plaintiff in *Chevron Oil Company* had suffered his injury four years prior to, and filed his action for damages in the Federal District Court one year prior to this Court's decision in the *Rodrique* case. The Court

refused to apply the state's one year statute of limitations retroactively, holding,

> both a devotion to the underlying purpose of the Lands Act's absorption of State Law and a weighing of the equities requires non-retroactive application of the state's Statute of Limitations here.

Chevron Oil Co. v. Huson, at 109. Constitutional principles were in no way considered or affected.

The equities of the within matter have already been considered at the state court level. As has already been illustrated, tort law and the attorney disciplinary process are state court functions. The courts of New Jersey have held that retroactive application of its rule is appropriate because the Supreme Court's interest in protecting the attorney disciplinary process far outweighs the interests of the single private litigant in maintaining his action for a defamation. In the case of *Lands v. Baseman*, 200 N.J. Super. 247 (App. Div. 1985) the Appellate Division of the New Jersey Superior Court, in a published opinion, faced the identical issue, and applied Rule 1:20-11(b) retroactively. In specifically finding that retroactive application of the rule is not constitutionally offensive, the court stated,

> The public interest identified by the Supreme Court in the Rule and in (*In the Matter of the Hearing on Immunity for*) *Ethics Complainants* (96 N.J. 669 [1984]) substantially outweighs in importance the private right which is impaired. (Citation omitted.) And the consequences of retroactive application of the Rule to bar plaintiff's claims are neither harsh nor oppressive. (Citation omitted.)

Id. at 249, 250.

It is respectfully submitted, therefore, that the within matter does not involve an important question of federal law which should be decided by this Court. Certiorari should, therefore, be denied.

CONCLUSION

For the reasons hereinabove set forth, the petition for writ of certiorari should be denied.

Respectfully submitted,

PATRICK F.X. FITZPATRICK
Attorney for Respondent

THOMAS D. FLINN
Of Counsel and
On the Brief